IN THE MATTER OF a Complaint under the *Human Rights Code, 1981*, S.O. 1981, c. 53, as amended

BETWEEN:

THE ONTARIO HUMAN RIGHTS COMMISSION
(on behalf of Carolyn Maddox)

Complainant

- and -

VOGUE SHOES AND GEORGE GOLDFORD

Respondents

DECISION OF BOARD OF INQUIRY

Board of Inquiry: Marilyn L. Pilkington

Appearances:

Ontario Human Rights Commission: Ms. Kaye Joachim, Counsel

Respondents: Barry W. Adams, Esq., Counsel

Hearings: May 17, 18, June 7, 8, 1990.

Cases referred to:

Tomen v. O.T.F. (No. 1) (1989), 11 C.H.R.R. D/97 (Ont. Bd. Inq.).

Re Federation of Women Teachers' Assciations of Ontario and Ontario Human Rights Commission et al (1988), 67 O.R. (2d) 492 (Div.Ct.).

Meissner v. 506756 Ontario Ltd.(No. 1) (1990), 11 C.H.R.R. D/94 (Ont. Bd. Inq.).

Saskatchewan Transportation Co. v. McDougall (1989), 74 Sask. R. 121 (Q.B.)

Quereshi v. Central High School of Commerce (1988), 9 C.H.R.R. D/4527 (Ont. Bd. Inq.).

Hyman v. Southam Murray Printing et al (1982), 3 C.H.R.R. D/617 (Ont. Bd. Inq.)

Morin v. Noranda Inc. (1988), 9 C.H.R.R. D/813 (Ont. Bd. Inq.).

Commercial Union Assurance v. Ont. Human Rights Commission et al (1988), 63 O.R. (2d) 112 (C.A.), aff'g (1987), 59 O.R. (2d) 481 (Div.Ct.).

Commodore Business Machines Ltd. v. Minister of Labour for Ontario (1985), 45 O.R. (2d) 17 (Div.Ct.).

Town of Walkerton v. Erdman (1894), 23 S.C.R. 352.

Cartwright v. City of Toronto (1914), 50 S.C.R. 215.

McGrigor v. Elgin County Board of Education (1974), 5 O.R. (2d) 356 (H.C.).

Leclerc v. St-Louis (1984), 47 O.R. (2d) 584 (Div.Ct.).

Trumbley and Pugh v. Metropolitan Toronto Police, [1987] 2 S.C.R. 577.

Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 2 S.C.R. 114.

Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 114.

MacBain v. Canadian Human Rights Commission (1984), 11 D.L.R. (4th) 202 (F.C.T.D., rev'd on other grounds 22 D.L.R. (4th) 119 (Fed.C.A.).

Mehta v. MacKinnon (1985), 67 N.S.R. (2d) 112 (S.Ct.), aff'd 19 D.L.R. (4th) 148 (C.A.).

Douglas v. Sask. (Human Rights Commission), [1990] 1 W.W.R. 455 (Q.B.).

Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927.

R. v. F. (C.A.) (1989), 69 C.R. (2d) 92, 31 O.A.C. 377 (C.A.).

Horton v. Niagara (Regional Municipality) (1988), 9 C.H.R.R. D/4611.

O'Malley v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536.

Bhinder v. C.N.R., [1985] 2 S.C.R. 561.

A.G. Canada v. Mossop (1990), 32 C.C.E.L. 276 (Fed.C.A.)

McMinn, Bourgeois and Brooks v. Sault Ste. Marie Firefighters Assn. (1986), 7 C.H.R.R. D/3458 (Ont. Bd. Inq.).

Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 (Ont. Bd. Inq.); aff'd Div. Ct. Sept. 17, 1985 (unreported); Leave to appeal to Ont. C.A. denied, Nov. 25, 1985 (unreported).

Chamberlin v 599273 Ontario Limited et al (Ont. Bd. Inq., June 1989, unreported).

Ouimette v. Lily Cups Ltd. (Ont. Bd. Inq., March 17, 1990, unreported).

Morgan v. Toronto General Hospital (Ont. Bd. Inq., 1977, unreported).

Jefferson v. Baldwin and B.C. Ferries Services (B.C. Bd. Inq., Sept. 1976, unreported).

DeJong v. Horlacher Holdings Ltd. (1989), 10 C.H.R.R. D/6283 (B.C. Human Rights Council).

Poulter v. JACI Enterprises Inc. (1989), 10 C.H.R.R. D/6141 (B.C. Human Rights Council).

Ede v. Canada (Canadian Armed Forces) (1990), 11 C.H.R.R. D/439 (Can. Hum. Rts. Trib.).

Fontaine v. Canadian Pacific Ltd. (1990), 11 C.H.R.R. D/288 (Can. Hum. Rts. Trib.).

Morgoch v. Ottawa (City) (No.2) (1989), 11 C.H.R.R. D/80 (Ont. Bd. Inq.).

Engell v. Mount Sinai Hospital (1990), 11 C.H.R.R. D/68 (Ont. Bd. Inq.).

Hamlyn v. Cominco Ltd. (1989), 11 C.H.R.R. D/333 (B.C. Human Rights Council).

State Div. of Human Rights v. Xerox Corp., 480 N.E. (2d) 695 (N.Y.C.A., 1985).

Gimello v. Agency Rent-A-Car Systems Inc. et al, Director, Division on Civil Rights, Dept. of Law & Public Safety, State of New Jersey, April 1989, unreported.

Whitehead v. Servodyne Canada Ltd. (1987), 8 C.H.R.R. D/3874 (Ont. Bd. Inq.).

R. v. Bushnell Communications Ltd. (1973), 45 D.L.R. (3d) 218, affi'd. (1974), 47 D.L.R. (3d) 668 (C.A.).

Bloomer v. Ratych, (1990, S.C.C., unreported).

Piazza v. Airport Taxicab (Malton) Assn. (1989), 69 O.R. (2d) 281 (C.A.).

Red Deer College v. Michaels and Finn, [1976] 2 S.C.R. 324.

Mifsud v. MacMillan Bathurst Inc. (1989), 70 O.R. (2d) 701 (C.A.).

Gohm v. Domtar Inc. (Ont. Bd. Inq., May 1990, unreported).

Statutes referred to:

Canadian Charter of Rights and Freedoms, s. 7, s. 11(b).

Human Rights Code, 1981, S.O. 1981, c. 51, as amended, ss. 4(1), 8, 9(1)(b), 28(d), 31(2), 38(2).

Statutory Powers Procedure Act, R.S.O. 1980, c. 484, as amended, ss. 10, 15, 23, 25.

Trustee Act, R.S.O. 1980, c. 512, s. 38(1).

Rules of Civil Procedure, O. Reg. 560/84, as amended, R. 31.11 (6), (7).

Canadian Human Rights Act, S.C. 1985, c. H-6, s. 25.

Human Rights Act, S.B.C. 1984, c. 22, s. 8(1).

Authors of Legal Works referred to:

Holmested and Watson, *Ontario Civil Procedure*, vo. 2, at 31-38.

Other Authors referred to:

Allon, N. (1975), The Stigma of Overweight in Everyday Life, in G. Bray (ed.), *Obesity in Perspective*. Washington: Government Printing Office.

This is an inquiry into a complaint by the Ontario Human Rights Commission that Vogue Shoes and George Goldford discriminated against Carolyn Maddox, now deceased, because of handicap and because of sex by requiring that she lose weight if she wished to continue to work as a shoe salesperson.

Carolyn Maddox had been employed as a sales clerk by Vogue Shoes in St. Catharines for 17 years. She left her employment in August 1985 after being told that she must lose 35 pounds within six weeks. She commenced an action for wrongful dismissal and also consulted with the Human Rights Commission, which issued a complaint on September 6, 1985 alleging that Vogue Shoes and its owner, George Goldford, had discriminated against her on the basis of handicap [Exhibit 2]. The wrongful dismissal action proceeded to examinations for discovery in April 1986, but at the hearing of this complaint, had not been prosecuted further.

Mrs. Maddox applied for and received unemployment insurance benefits after a two week waiting period. She made inquiries about several jobs, but remained unemployed until September 1986, when she obtained employment as a sales clerk at another footwear store in St. Catharines. Two months later, in November 1986, Mrs. Maddox and her husband were involved in an automobile collision while vacationing in Florida. Tragically, Mrs. Maddox died, and Mr. Maddox was hospitalized for two and a half months.

As executor of Mrs. Maddox's estate, Mr. Maddox instructed the Ontario Human Rights Commission to proceed with the complaint. In November 1989, the Commission amended the complaint to add a claim that Vogue Shoes and George Goldford had discriminated against Mrs. Maddox on the basis of sex. The amended complaint [Exhibit 1] was issued in the name of the Commission, pursuant to subs. 31(2) of the *Human Rights Code, 1981*, S.O. 1981,

c. 53, as amended.

On April 20, 1990, I was appointed by the Minister of Citizenship as a board of inquiry to investigate the complaint. The hearing of the complaint began on May 17 and 18, and continued on June 7 and 8, 1990, in St. Catharines, after which counsel for both parties filed further material.

I. Preliminary Motions

At the opening of the hearing, counsel for the respondents, Mr. Adams, raised a number of preliminary issues. First, he moved for an adjournment of the proceedings pending the commencement and disposition of an application for judicial review of the Human Rights Commission's decision to request appointment of a board of inquiry some five years after the alleged act of discrimination and after the death of Mrs. Maddox. Second, in the alternative, he moved for a dismissal of the complaint by the board of inquiry on the grounds of delay and the unavailability of Mrs. Maddox as a witness in the proceedings. Third, he indicated that he would oppose the Commission's anticipated request that I admit in these proceedings the transcript of the examination for discovery of Mrs. Maddox in the wrongful dismissal action.

At the conclusion of argument on these preliminary matters, I dismissed the motions to adjourn the proceedings and to dismiss the complaint and ruled that the transcript was admissible. I further indicated that the issues raised on behalf of the respondents would remain open in the proceedings, meaning that the matter of delay and the unavailability of Mrs. Maddox could be taken into account in assessing the evidence, making findings of fact and determining appropriate remedies, and that if it appeared on the evidence that the delay and the death of Mrs. Maddox made it impossible for the respondents to present or challenge material evidence, the

complaint could be dismissed. The reasons in support of these dispositions follow.

1. Motion for adjournment pending application for judicial review

Mr. Adams submitted that the Commission's delay in requesting the Minister to appoint a board of inquiry had prejudiced the respondents and contravened their rights guaranteed by s. 7 and s. 11(b) of the *Charter of Rights and Freedoms*. He requested that the board adjourn to enable the respondents to seek judicial review of the Commission's decision and a stay of the proceedings before the board. No application for judicial review had yet been made, but Mr. Adams undertook to proceed with the application expeditiously.

An appeal from the decision of a tribunal generally operates as a stay in the matter, but an application for judicial review does not: *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, s.25. In the latter case, however, the tribunal has discretion to adjourn its proceedings to prevent abuse of its processes: *Statutory Powers and Procedure Act*, *supra*, subs. 23(1).

In *Tomen v. O.T.F. (No. 1)* (1989), 11 C.H.R.R. D/97 (Ont. Bd. Inq., Baum), a board of inquiry pursuant to the *Human Rights Code* refused to adjourn pending the outcome of other court proceedings which might render the board proceedings moot. The board took into account not only the interests of the parties, but the public interest in vindicating expeditiously the rights protected by human rights legislation. In a concurrent application to the Divisional Court to stay the proceedings before the board, the Court held that, even if it had jurisdiction to stay the proceedings, it would not do so:

> "Since any stay could be lengthy, I do not believe that it is in the public interest to delay proceedings before the board. As a matter of balance of convenience, taking into account the public interest, no stay should be granted....This court is not willing to stay proceedings before the board of inquiry pending the outcome

> of the proceedings in the Court of Appeal, but this is without prejudice to whatever decision the board may reach on the issue. The board has the right to control its own procedure and this court does not wish to interfere with the decision presently under reserve by the board."

Re Federation of Women Teachers' Associations of Ontario and Ontario Human Rights Commission et al (1988), 67 O.R. (2d) 492 (Div. Ct.), per McKeown J. at 518-19.

Even when the application for judicial review is based on delay in appointing a board of inquiry, the board has declined to adjourn. Thus in *Meissner v. 506756 Ontario Ltd. (No. 1)* (1990), 11 C.H.R.R. D/94 (Ont. Bd. Inq., Backhouse) the board concluded, at D/95, that:

> "Although counsel for the respondents has undertaken to proceed to judicial review within thirty days, an application to the courts has not yet been commenced, and it is unclear how long it will take the courts to resolve the issues with finality. Since the *Code* mandates the expeditious processing of complaints concerning violations of the rights therein, I have decided to exercise my discretion to refuse the adjournment. In my opinion, the Board can best carry out its mandate under the *Code* by proceeding with the hearing until an order of the court has actually been made prohibiting it from further activity or quashing some order already made by which it assumed jurisdiction."

For the same reasons, I concluded that I should exercise my discretion to refuse the adjournment requested. This did not preclude the respondents from proceeding to judicial review of the decision to appoint the board of inquiry.

2. Motion for dismissal of complaint on grounds of delay and unavailability of Mrs. Maddox

In the alternative, Mr. Adams moved that the board dismiss the complaint on the grounds of delay in appointing a board of inquiry and on the grounds of the unavailability of Mrs. Maddox.

(a) Delay

Five years expired between the initial complaint and the decision of the Commission to request appointment of a board of inquiry. The fact that Mrs. Maddox is unavailable to testify is not a consequence of the delay since she died within fourteen months of the initial complaint, and thus, in my view, her unavailability is a factor to be considered separately from the delay. Part of the delay is explained by the novelty of the issues and the need to obtain and assess expert evidence. To a lesser extent, part of it may be due to the death of Mrs. Maddox and the injuries suffered by her executor. No doubt most of the delay is accounted for by the Commission's investigation, deliberation and internal constraints. While the delay is undesirable, it is understandable, taking into account the obligations of the Commission to investigate a complaint, determine whether it warrants appointment of a board and attempt to effect settlement: see *Saskatchewan Transportation Co. v. McDougall* (1989), 74 Sask. R. 121 (Q.B.). That process is further complicated where, as here, there is an issue whether the treatment complained of constitutes discrimination on a ground prohibited by the *Code*. Substantial delays have not resulted in dismissals in other Ontario cases: see *Quereshi v. Central High School of Commerce* (1988), 9 C.H.R.R. D/4527 (Ont. Bd. Inq., Ratushny) (four years); and *Meissner v. 506756 Ontario Ltd. (No. 1) supra*, (three and a half years).

A board's statutory authority to dismiss a complaint on the basis of delay is limited to circumstances which constitute an abuse of process within subs. 23(1) of the *Statutory Powers Procedure Act*, supra; see *Quereshi v. Central High School of Commerce, supra*; *Meissner v. 506756 Ontario Ltd. (No.1), supra*. The proper approach to the exercise of this discretion is set forth in *Hyman v. Southam Murray Printing (No. 1)* (1982), 3 C.H.R.R. D/617

(Ont. Bd. Inq.) in which Professor McCamus held at D/621, that a complaint should not be dismissed at the outset on the basis of delay unless the board concludes that the facts cannot be ascertained with sufficient certainty to determine whether a violation of the *Code* did occur:

> "Having been assigned, by order of the Minister of Labour [now the Minister of Citizenship], a statutorily defined task of undertaking an inquiry to ascertain certain facts, the board of inquiry should proceed to attempt to do so notwithstanding the passage of considerable time unless the passage of time has made fulfilment of its task impossible."

While the delay in this case may have inconvenienced the respondents and may have had some effect on witness memory, it has not been established that the respondents have suffered any specific or substantial prejudice (*Quereshi v. Central High School of Commerce*, *supra*, at D/4529; *Morin v. Noranda Inc.* (1988), 9 C.H.R.R. D/5245; *McMinn et al v. Sault Ste. Marie Firefighters Association* (1986), 7 C.H.R.R. D/3458, at D/3467), or that "the facts relating to the incident in question cannot be established with sufficient certainty" (*Hyman v. Southam Murray Printing (No. 1)*, *supra*, at D/621, and *Meissner v. 506756 Ontario Ltd. (No.1)*, *supra*, at D/96).

The respondents do not allege that they are unable to locate or produce potential witnesses as was the case in *Commercial Union Assurance v. Ontario Human Rights Commission* (1987), 59 O.R. (2d) 481 (Div.Ct.), aff'd 63 O.R. (2d) 112 (C.A.). Further, there was no suggestion that Mr. Goldford, who was the only witness for the respondents, had difficulty remembering the events in issue. In any event, he had been examined for discovery some months following the events, and accordingly there is a record of his recollections made under oath.

Accordingly, I concluded that the proper course was to proceed with the hearing,

without foreclosing further consideration of the effect of delay and the unavailability of Mrs. Maddox. It is open to a board in circumstances such as these to weigh the prejudice or unfairness to any party in "making particular findings of fact or in refusing or fashioning a remedy": *Hyman v. Southam Murray Printing (No.1), supra*, at D/621; see also, *Meissner v. 506756 Ontario Ltd. (No.1), supra*, at D/96; *Tomen v. O.T.F. (No.1), supra*, at D/103; and *Morin v. Noranda Inc., supra*, at D/5249.

b) Unavailability of Mrs. Maddox

The respondents submitted that the death of Mrs. Maddox seriously prejudices their ability to respond to the complaint. No doubt the death of a key witness may cause prejudice, particularly to the party who intended to call the witness: see *Commercial Union Assurance v. Ontario (Human Rights Commission), supra*, at 487 (Div.Ct.). In this case, the alleged prejudice to the respondents arose from the Commission's intention to seek leave to introduce as evidence the transcript of the examination for discovery of Mrs. Maddox in the wrongful dismissal action.

Mr. Adams took the position that the board has no jurisdiction to proceed in the absence of Mrs. Maddox, but this cannot be so. A complaint pursuant to the *Human Rights Code* serves not only the private interests of individuals in being free from unlawful discrimination, but also the public interest. The *Code* authorizes the Commission, in subs. 31(2), to "initiate a complaint by itself or at the request of any person", and provides, in subs. 38(2), that the Commission has carriage of the complaint. Further, in this case the complaint is consented to by the executor of the estate of Mrs. Maddox. Pursuant to s. 38(1) of the *Trustee Act*, R.S.O. 1980, c. 512, the executor may maintain an action for injury to the deceased

person in the same manner and with the same rights and remedies as would have been available to the deceased, if living. Accordingly I conclude that the death of Mrs. Maddox does not affect the jurisdiction of the board to proceed with its inquiry.

Mr. Adams further requested that I dismiss the complaint on the grounds that the unavailability of Mrs. Maddox and the admissibility of the transcript of her examination for discovery would deprive respondents of the right to cross-examine the principal witness for the Commission, a right that is conferred by s. 10(c) of the *Statutory Powers Procedure Act*, *supra*:

> "A party to proceedings may at a hearing,
> ...
> (c) conduct cross-examinations of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence."

Mr. Adams submitted that

> "on any issue where there is any material difference in position between the parties, by reason of the complainant's absence you will be completely unable to test credibility, observe demeanour, consider inconsistent statements or prior inconsistent statements, and that puts both yourself and the respondents at some significant disadvantage in terms of dealing with the factual issues in this case." [Transcript, p.13]

The right conferred by s. 10 of the *Statutory Powers Procedure Act* to cross-examine witnesses must be read in conjunction with s. 15 which provides that,

> "15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject matter of the proceedings and may act on such evidence, but the tribunal may exclude anything unduly repetitious.
>
> (2) Nothing is admissible in evidence at a hearing,
>
> (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

> (b) that is inadmissible by the statute under which the proceedings arise or any other statute.
>
> (3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings."

These provisions enable a tribunal to receive evidence that would not be admissible in a court. It follows that evidence that is admissible in court proceedings may be admitted by a tribunal: see *Commodore Business Machines Ltd. v. Minister of Labour for Ontario* (1985), 49 O.R. (2d) 17 (Div.Ct.).

It is well-established at common law, as stated in *Stephen's Digest of the Law of Evidence*, cited with approval in *Town of Walkerton v. Erdman* (1894), 23 S.C.R. 352, that:

> "Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding...when the witness is dead, provided (1) the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness; (2) that the questions in issue were substantially the same in the first as in the second proceeding; and (3) that the proceeding if civil, was between the same parties, or their representatives in interest."

In the circumstances of this case, I find that the respondents had the right and opportunity to cross-examine Mrs. Maddox at her examination for discovery; further, that the factual questions in issue in the human rights inquiry, being the circumstances in which Mrs. Maddox left her job and the damage she suffered as a result, are substantially the same as the issues in the wrongful dismissal action; and finally, that the proceedings are between the same parties or their representatives in interest. Although the complaint is brought by the Human Rights Commission, it is supported by Mrs. Maddox's executor, seeks to vindicate the alleged discrimination against Mrs. Maddox, and, if successful may result in damages to the benefit of her estate.

Mr. Adams relied on the decision in *Cartwright v. City of Toronto* (1914), 50 S.C.R. 215, that the common law rule does not apply to transcripts of an examination for discovery which is wholly for the benefit of the examiner and cannot be used by the opposing party unless the examining party seeks to introduce it for its own purposes. To the same effect, see *McGrigor v. Elgin County Board of Education* (1974), 5 O.R. (2d) 356 (H.C.), and *Leclerc v. St-Louis* (1984), 47 O.R. (2d) 584 (Div. Ct.). The analysis in these cases has been superceded by Rule 31.11 (6) and (7) of the *Rules of Civil Procedure*, O.Reg. 560/84 as amended, which confer on a civil court a discretion to admit as evidence the transcript of the examination for discovery of a deceased party, taking into account the following factors:

> "(a) the extent to which the person was cross-examined on the examination for discovery;
> (b) the importance of the evidence in the proceeding;
> (c) the general principle that evidence should be presented orally in court; and
> (d) any other relevant factor."

Any prejudice to an examining party from the introduction of the transcript of an examination for discovery is one of the factors which could be taken into account in determining its admissibility.

The authors of Holmsted and Watson, *Ontario Civil Procedure*, vol.2, at 31-88, make the following comment on the relative weight of these factors:

> "Obviously the rule directs attention to whether cross-examination actually took place at the examination for discovery ... and stresses the general principle that normally evidence should be presented orally in court...But if the testimony is of crucial importance in the action, for example if the original plaintiff died after being examined for discovery and the personal representative cannot make out a *prima facie* case without resort to the deceased's discovery, the rule permits leave to be granted even in the absence of extensive cross-examination if justice so requires."

Mrs. Maddox's testimony is important in that it enables the Commission to

establish a *prima facie* case. Since a board of inquiry is not precluded from admitting hearsay evidence, much of the case could have been led through other witnesses, but Mrs. Maddox's testimony under oath is clearly preferable to hearsay reports of what she said to others about the events in issue. When Mr. Adams examined Mrs. Maddox for discovery, he did not cross-examine her extensively. However, in all the circumstances of the case, including the availability of records of previous statements Mrs. Maddox had made to physicians, and evidence of job opportunities advertised in newspapers which can be compared with her notes of job inquiries, it appears to me that the evidence of Mrs. Maddox can be adequately assessed.

I thus conclude that the transcript of the examination for discovery of Mrs. Maddox is admissible pursuant to s. 15 of the *Statutory Powers Procedure Act, supra*, but that the unavailability of Mrs. Maddox to cross-examination in this proceeding may be taken into account in weighing credibility and fashioning a remedy.

After hearing all the evidence, I conclude that the delay and unavailability of Mrs. Maddox have not prejudiced the respondents' ability to mount a defence. The facts relating to the employment relationship and its termination are basically not in dispute, and the records kept by Mrs. Maddox's physicians provide credible evidence of her state of mind before and after the events in issue. If anything, it is the Commission's case which has been weakened in that Mrs. Maddox had no opportunity to respond to the evidence of job opportunities available and there is little evidence to substantiate the extent to which Mrs. Maddox continued to look for work after the examination for discovery in April 1986.

(c) Charter Arguments

Mr. Adams relied on s. 7 and s. 11(b) of the *Canadian Charter of Rights and Freedoms* in support of his motion that the board dismiss, or, more accurately, stay the complaint.

Section 11(b) of the *Charter* provides that "a person charged with an offence has a right to be tried within a reasonable time." In my view, this provision is of no assistance to the respondents. The Supreme Court of Canada has held that a person charged with a disciplinary offence under the *Police Act* is not "charged with an offence" for the purpose of s. 11 of the *Charter*, since the proceedings are not criminal in nature and do not involve penal consequences: *Trumbley and Pugh v. Metropolitan Toronto Police*, [1987] 2 S.C.R. 577. Mr. Adams submitted that human rights complaints are different from disciplinary proceedings, and that it is an open question whether s. 11(b) of the *Charter* applies to the former. I find no merit in this argument, in light of the fact that human rights proceedings are considered remedial and compensatory rather than punitive, and in light of the cases prior to the Supreme Court of Canada's decision in *Trumbley and Pugh, supra*, which determine that s. 11 of the *Charter* does not apply to human rights proceedings. As to the nature of human rights proceedings, see: *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 2 S.C.R 114 and *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84. With respect to the application of s. 11 of the *Charter* to human rights proceedings, see *MacBain v. Canadian Human Rights Commission* (1984), 11 D.L.R. (4th) 202 (F.C.T.D.) rev'd on other grounds 22 D.L.R. (4th) 119 (Fed.C.A.); *Re Commodore Business Machines Ltd. and Minister of Labour for Ontario, supra*; *Mehta v. MacKinnon* (1985), 67 N.S.R. (2d) 112 (S.Ct.), aff'd 19 D.L.R.

(4th) 148 (C.A.); *Douglas et al v. Saskatchewan (Human Rights Comm.)*, [1990] 1 W.W.R. 455 (Q.B.).

Mr. Adams also submitted that the delay and unavailability of Mrs. Maddox deny to the respondents the principles of fundamental justice and thus infringe s. 7 of the *Charter of Rights and Freedoms*, which provides that:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Section 7 protects only the rights of individuals, not corporations, and accordingly would be available only to exclude the complaint as against George Goldford: *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927; see also, *Douglas et al v. Saskatchewan (Human Rights Comm.)*, *supra.*

In any event, application of the principles of fundamental justice depends upon the particular circumstances of each case: *Quereshi v. Central High School of Commerce*, *supra*, at D/4530. The discretion to stay proceedings on the basis of delay in the institution of proceedings is a narrow one. In criminal proceedings, where the test would be strictest, a stay is not granted in such circumstances pursuant to s. 7 of the *Charter* unless the delay would preclude a fair trial: see *R. v. F.(C.A.)* (1989), 69 C.R. (2d) 92, 31 O.A.C. 377 (C.A.). In light of my findings on the issues of delay and unavailability of Mrs. Maddox, I find that proceeding with the hearing does not deny Mr. Goldford the principles of fundamental justice.

It is thus not necessary for me to determine whether a person's liberty or security of the person is infringed when the person is subject to investigative or regulatory proceedings such as those before a board of inquiry under the *Human Rights Code*, a matter which was not

argued in these proceedings.

Accordingly, I find that the Respondents do not come within s. 11(b) of the *Charter*, that s. 7 of the *Charter* is not available to the corporate respondent, and that, even if a human rights inquiry is an interference with liberty or security of the person, there has been no denial in this case of the principles of fundamental justice.

I turn now to the substantive issues in the case, and the facts which generated them.

II. Facts with respect to the Alleged Discrimination

1. The Respondents

George Goldford, through Palmer & Goldford Limited, owns and operates a shoe store in downtown St. Catharines under the trade name Vogue Shoes. He has been in business at that location since September 15, 1951. In 1966, he and his wife opened a second shoe store at the Penn Centre in St. Catharines, also operating as Vogue Shoes, but separately incorporated as Joyford Investments Limited. Mrs. Goldford holds one share in Palmer & Goldford Limited and 99 of the 100 shares of Joyford Investments Limited. Mr. Goldford works at the downtown store where he also employs one full-time and two part-time sales clerks. At the Penn Centre store, there are three full-time employees and two part-time employees in addition to Mrs. Goldford who is at the store three-quarters of the time. The same products are sold at the two stores: womens' footwear and accessories of a "better grade" and conventional style, with dress shoes ranging in price from $85 to $200.

Mr. Goldford testified that, although the stores had employed men as sales clerks from time to time, 95% of the employees had been women. Mrs. Maddox was not the only

long-term employee. Another woman worked for Vogue Shoes for 23 years. Nor was Mrs. Maddox the only employee who was overweight. Mr. Goldford identified three other women employees, including Mrs. Maddox's daughter Jill English, a witness in the proceedings, who were of comparable size. [Transcript, p. 373]

Employees were expected to dress appropriately for the presentation of the business and were also expected to keep their footwear, which was available at reduced cost, in good condition. Mr. Goldford testified that, although jeans were not allowed, he permitted, and even encouraged, women sales clerks to wear appropriate slacks.

Mrs. Goldford developed a list of "Ten Commandments" for employees, which had been posted in the stores since 1978. It laid down the following rules:

> "EVERYONE IS
> 1. Going to hang their coats, sweaters, jackets, etc. at the back of the stockroom, or wherever coat hooks are (with boots).
> 2. Going to find a place to keep their handbags, packages, etc. at the rear of stockroom -- out of sight and out of the way.
> 3. Going to take home OR THROW AWAY any shoes or boots OTHER THAN THE ONE (AND ONE EXTRA PAIR) THAT THEY ARE WEARING or CAN CHANGE INTO ... and make sure that the shoes being worn while selling on the floor are plished [sic], seasonable, presentable and from recent stock.
> 4. Going to resolve to do less chatting at the cash-wrap desk, and in keeping this resolve will ultimately make fewer, if any, errors!
> 5. Going to eat any food-stuffs at the table in the designated eating area in stockroom ONLY -- e.g. just liquid refreshment is permitted in the foyer area of the stockroom. NO DANISH ....NO MUFFINS .....NO COOKIES! ..... anytime, day or evening.
> 6. Going to take turns keeping washroom spotlessly clean — we may avoid as many colds, and also wiping the telephones each a.m. with windex or lysol spray...this is where germs are spread.
> 7. Going to keep personal calls at a minimum -- unless they are urgent! The same applies to personal visits by friends and family during business hours.
> 8. Going to be in at 9:15 a.m. and punctual otherwise at any other time of day.
> 9. Going to share the stockroom chores....incoming, outgoing, checking,

tidying....be self-motivated! It isn't necessary to remind everyone about checking the windows daily ..... dusting and tidying stock in and around the store.....putting things away as used.

10. Going to leave your troubles at home and SMILE!" [Exhibit 27]

2. Carolyn Maddox

In August 1985 Carolyn Maddox was 42 years old, married to Donald Maddox, and had a son and daughter in their early twenties. She had been hired by George Goldford as a full-time sales clerk at Vogue Shoes on August 15, 1968, after working in three other shoe stores or departments for a total of six years and in the produce department of a grocery store. She had completed grade 12 and also held a diploma from the Shoe Retailers Association.

Mrs. Maddox worked at the downtown store with Mr. Goldford, and occasionally relieved at the Penn Centre store. It is common ground that she was a very capable shoe salesperson. She also arranged shoe displays and, when Mr. Goldford was absent (sometimes for periods of up to six weeks), she attended to the banking and deposits for the downtown store.

Dr. Douglas Ralph, Mrs. Maddox's general physician, testified on the basis of his records [Exhibits 10, 10A] that Carolyn Maddox was 5' 4 and 1/2" tall, that when he began to see her as a patient in 1981 she was obese, weighing 80.5 kg (177 lbs.), and that in May 1985 she weighed 90.5 kg (200 lbs.). Mr. Goldford testified that, although Mrs. Maddox's weight fluctuated, it had gradually increased over the years, and that he had considered her to be overweight for about ten years. At her examination for discovery, Mrs. Maddox testified that she had never sought advice about a program of weight reduction from Dr. Ralph or any other physician [Exhibit 7, p.20], but Dr. Ralph's records indicate that Mrs. Maddox was concerned about her weight on a continuing basis and tried periodically to lose weight through dieting and

exercise.

There was no evidence that Mrs. Maddox's obesity resulted from any abnormal medical condition, nor was it the source of health problems. Dr. Ralph conducted tests, but "didn't feel her obesity at her age was causing any physiological problem" [Transcript, p.231].

Mrs. Maddox was described by Mr. Goldford as "outgoing and friendly" and by her husband as "happy-go-lucky and bubbly", but her physician's records also reveal that she suffered frequently from depression and sleep disturbances. She attended at Dr. Ralph's office on a very regular basis to discuss a variety of medical conditions and a variety of personal problems independent of any problems connected with her work. Her son, who was treated for alcoholism in Buffalo, New York during the summer of 1985, was a continuing source of concern to her, and she suffered from chronic migraine headaches and allergies. The migraines were sufficiently severe that in July 1985 Dr. Ralph referred Mrs. Maddox to Dr. E.R. Tunks, a pain specialist at the Chedoke-McMaster Hospital in Hamilton, who assessed her condition and adjusted her medications. Dr. Tunks reviewed Mrs. Maddox's medical and personal history with Mr. and Mrs. Maddox, and noted in his report that he had "the impression of a lady who is really well balanced, has a good attitude, has no neurotic traits to speak of and no psychogenesis" [Exhibit 11].

3. The Employment Relationship

It appears that for the most part Mr. Goldford and Mrs. Maddox got along quite well together. Mrs. Maddox's daughter Jill English, who worked part-time at Vogue Shoes from August 1983 until June 1986 testified that:

> "I believe they had a good working relationship throughout the years. Certainly there were times where they clashed, but my Mom had a tremendous amount of

respect for Mr. Goldford and I believe that he did of her too." [Transcript, p.281]

Nonetheless, there were continuing sources of irritation in the relationship. Mr. Goldford testified that on a number of occasions he discussed with Mrs. Maddox matters which he considered were becoming slipshod and needed to be reviewed. In particular, he testified that on several occasions he spoke to Mrs. Maddox about appropriate dress. He recalled one occasion when she had come to work dressed in tight-fitting "toreador pants" and a "T-shirt" and he had sent her home to change. [Transcript, p.371] He testified that:

> "...basically the problem was that she didn't really know how to wear the proper clothes. She was a heavy girl and she did not wear the kind of clothes that would make her look less heavy...She just did not dress to the best of her ability as far as the appropriateness when she was working in the store." [Transcript, p.372]

Mr. Goldford testified about other recurring problems he perceived with Carolyn Maddox: puntuality, making mistakes on bills while chatting to customers, and too many personal telephone calls and visits, particularly during the year when Mrs. Maddox was president of her Lioness Club and, according to Mr. Goldford, appeared to be conducting a good deal of their business over the store's only telephone line. On at least three or four occasions he had discussed these problems with her. After each discussion, he said, she improved, but within two or three months had become "lackadaisical" again.

Despite these differences about dress and other matters, the uncontroverted evidence of Mr. Goldford is that there were no difficulties about accommodating Mrs. Maddox's health problems. When she suffered from migraine headaches, which recurred monthly, and was not able to come to or remain at work, he accommodated her needs. Sometimes it was he who insisted that she go home. [Transcript, pp.375-76]

Mr. Goldford periodically tried to encourage Mrs. Maddox to lose weight. On

one occasion, he told her that she was a pretty lady and would be prettier if she lost some weight [Transcript, pp.403-4]. He offered her the incentive of $50 if she succeeded in dieting [Transcript, p.372, 404]. The evidence does not establish whether Mrs. Maddox resented these discussions or whether she readily discussed her weight with Mr. Goldford with whom she had worked closely for many years. [Transcript, pp. 357-58, 373] Mr. Goldford's concern about her weight was two-fold: in my view of the evidence, it related mainly to her appearance [Transcript, p.407], and secondarily to her own health and well-being [Transcript, pp.402, 408]. He considered that she would feel better if she lost weight [Transcript, p.373].

During the summer of 1985, the working relationship between Mrs. Maddox and Mr. Goldford deteriorated. Mr. Goldford recalls that in July of 1985 Mrs. Maddox seemed "withdrawn", "preoccupied and uptight," and was sensitive to criticism or direction from him about, for instance, her arrangement of shoe displays at the store. [Transcript, pp. 362-3, 379] He felt she was unwilling to acknowlege his authority, and although he could not recall specific instances, he did remember saying to her one day, "The last time I looked I was still signing the cheques." [Transcript, p. 369]

To Mrs. Maddox, it appeared that Mr. Goldford was being unduly critical. Her statements to physicians during the summer of 1985 indicate that she was unhappy at work and had determined to make a change. On July 25, 1985, Dr. Ralph noted that she had said "I've made a decision that the next time I have a problem with my boss, I'm out the door" [Exhibits 10, 10A]. Further, Dr. E.R. Tunks, the pain specialist, noted in his report, dated July 26, 1985:

> "she works as a senior person in a small business for the last 17 years. There is some pressure and unpleasant conditions that she has sometimes had to deal with.

> She doesn't, again, think this is related to her headache problem and she has her mind made up of how she is going to deal with it." [Exhibit 11]

Mrs. Maddox's husband, Donald Maddox, gave conflicting evidence, testifying that in the summer of 1985 Mrs. Maddox:

> "seemed content [in her job], but there again she didn't say she wasn't happy. I know her and Mr. Goldford at times maybe had their differences, but nothing that was out of character." [Transcript, p.243]

He denied that they had talked about her quitting her job at Vogue Shoes and maintained this position even after Commission counsel drew to his attention the above report of Dr. Tunks, who spoke with Mrs. Maddox in Mr. Maddox's presence. Mr. Maddox's evidence is also in conflict with that of his daughter, Jill English:

> "Q. In the summer of 1985, before your mother ceased working at Vogue Shoes, what was the nature of the relationship between your mother and George Goldford?
>
> A. Things had gotten very tense towards the end of the summer. I know that my Mom was unhappy with how things were going. Her holidays had been changed and that did not make her happy, that her and my Dad would have separate holidays. I recall an incident where my Mom came home from work and said that Mr. Goldford had said that she was talking back and that upset her. She felt that he was riding her for every issue that was going on, things she had been doing for seventeen years was no longer right putting shoes out on the sales rack, you know, she felt he was riding her for everything she was doing at that time. It was very tense.
>
> Q. To your knowledge, was your mother planning on leaving Vogue Shoes?
>
> A. I know that she and my dad had talked about it and she was contemplating that she should look for something else, that she would be reading the paper and maybe find something definitely more appropriate for her...she would leave when she had another job, she would not leave before that." [Transcript, p.281]

I find that the relationship between Mr. Goldford and Mrs. Maddox was strained in the summer of 1985. I further find, on the basis of Mrs. Maddox's statements to her physicians, that she had decided to leave the job and seek her remedies the next time she had a problem with Mr.

Goldford.

4. The Events of August 1985

At the conclusion of business on Saturday, August 3, 1985, Mr. Goldford met with Mrs. Maddox in his office at the shoe store. He made some notes on his desk diary in preparation for that discussion, indicating that he intended to speak with her about her failure to observe six of the ten rules established for employees, that she was chatting with other staff when customers were in the store, being "lackadaisical" with respect to dress, making personal telephone calls and talking back to Mr. Goldford. He noted that she had been "too comfortable too long", that she was taking her job for granted, that she was not indispensable, and that she was overweight. His note with respect to the last point included the phrase "35 pounds by birthday or gone" [Exhibit 17]. He testified, however, that what he said in the discusion was "completely different" [Transcript, p. 410]. He said he did not intend to terminate her employment and did not expect that she would terminate it. [Transcript, p. 380]

Mrs. Maddox, in her examination for discovery, testified that Mr. Goldford "demanded that I lose thirty-five pounds by my birthday or my position would be terminated." In response to further questioning, she revised her position somewhat, testifying, with apparent hesitation, that:

> "Ahh, he may've said something like, ahh, altern— ahh, might have to, ahh, 'You might have to seek alternate employment.' ...
>
> Q. ...Did he give you any reason to believe in that conversation that that alternative employment would have to commence immediately after your birthday, or did he give you any time frames in which you might otherwise be —
>
> A. No, October 15 —
>
> Q. —expected to find alternate —
>
> A. Well, my birthday of October 15th was the only date mentioned." [Exhibit 7, pp.14-15]

Mr. Goldford testified that he told Mrs. Maddox the situation would be reviewed on October 15th. In my view, nothing turns on this since, in any event, he confirmed by letter to Mrs. Maddox [Exhibit 6, Tab 2] and in his testimony [Transcript, p. 418] that if Mrs. Maddox was unwilling to engage in a reasonable weight reduction program, her long-term employment prospects at Vogue Shoes were not encouraging.

At her examination for discovery, Mrs. Maddox testified that the August 3rd conversation came as a surprise to her, but she also confirmed that there had been previous discussions about her manner of dress and her weight, and that, from the beginning of her employment, she had known that she was expected to "dress to fashion". [Exhibit 7, pp. 13-17] She testified that on August 3, 1985, in addition to demanding that she lose weight, Mr. Goldford told her that she either did not know how to dress or did not care, that she had become complacent and that she was not to wear slacks in the store until he said she could. [Exhibit 7, p. 14]

Mr. Goldford testified that his concern was with the type of slacks she wore. In his opinion, dresses suited her better, but he did not forbid slacks. He estimated that Mrs. Maddox wore slacks at work two-thirds of the time and other employees, including those of comparable weight, also wore slacks. [Transcript 370, 403-7, 418-19] If anything turns on this issue, I accept the evidence of Mr. Goldford which I found to be convincing.

It is common ground that Mrs. Maddox was upset when Mr. Goldford told her to lose 35 pounds by her birthday. She threatened to leave. He told her to think it over during her week's vacation, the following week. He also asked her, in any event, to continue to work during the week after her vacation when the other salesclerk would be away, and she agreed to

do so.

Mrs. Maddox and her husband returned to the store on the evening of August 3, 1985, used her key to enter the premises, went to Mr. Goldford's office on the mezzanine level, and photocopied the page from his desk diary on which he had written the notes for his discussion with Mrs. Maddox.

Mrs. Maddox then sought legal advice and delivered the following letter, dated August 9, 1985, to Mr. Goldford's office:

> "Further to our discussion of August 1st, [sic] 1985 wherein you have required me to lose 35 pounds by October 15th, my reaction was one of shock and dismay.
>
> While on vacation, I have considered my position and taken advice. My Doctor says such weight loss is next to impossible, risky and unhealthy and he counsels against it. I must follow his advice.
>
> After 17 years of loyal and continous employment, you have breached the bond between us by your unreasonable and impractical demand and I cannot continue in your service. I am advised that all this constitutes constructive dismissal from my employment and reasonable demands [sic] constitutes unfair practice for which I will obtain damages.
>
> I give you notice of pending legal action and termination of my employment effective Saturday, August 17, 1985. I will expect interest on my claims unless compensation is made very soon.
>
> I regret these developments but you have placed me in an impossible position and I must now assert my rights." [Exhibit 6, Tab 1]

After her week's vacation, Mrs. Maddox returned to work from August 12th to 17th. Mr. Goldford told her that he was disappointed with her reaction to their discussion, but they discussed it no further and had no difficulty working together that final week. Mr. Goldford also sought legal advice, and on August 17, 1985, when Mrs. Maddox handed in her key and was provided with her final payments and records, he delivered to her the following letter, dated August 15, 1985:

> "This will acknowledge receipt of your letter of August 9, 1985 which

causes me some considerable disappointment. After numerous attempts to encourage you to engage in a program of sustained weight reduction and generally enhance your presentability to our customers, you have apparently chosen to reject all such overtures and voluntarily terminate your employment with us.

My suggestion of an October 15th date by which to lose at least some weight was principally for the purpose of impressing upon you the seriousness of which [sic] we believe is an increasing health problem for you. Your expression of shock and dismay can only reflect the fact that you have not listened to us on the prior occasions on which we have spoken to you about this problem.

If indeed your Doctor recommends against such rapid weight loss, I would have thought the reasonable course of action would have been to have discussed the matter further with me and perhaps propose some other alternative instead of threatening legal action. I have also sought legal counsel and am assured that your terms and conditions of employment have not been altered in any way so as to constitute a constructive dismissal.

Clearly, if your [sic] are indeed unwilling to engage in a reasonable weight reduction program then the long term prospects of our continued relationship are not encouraging. However it simply does not follow that your services with the Company must terminate on Saturday, August 17th. Should you decide not to respond to the overtures we have made, we hereby advise that your job will continue to be open on exactly the same terms as at present, for a period of up to and including December 1, 1985, during which time if you conduct a reasonably diligent job search, we expect you shall find suitable alternative employment given your considerable experience.

In any event, since you have chosen to voluntarily terminate your employment, your salary will be continued to the last day you choose to work for us. No consideration will be given whatsoever to any question of "damages" or "interest" as you simply have no legal right to make this claim in the circumstances." [Exhibit 6, Tab 2]

Mrs. Maddox's daughter, Jill English, continued to work at Vogue Shoes until June 1986. She testified that after her mother ceased working at Vogue Shoes, both Mr. and Mrs. Goldford indicated to her that their differences with her mother would have no impact on her employment.

III. The Alleged Grounds of Discrimination

The complaint alleges that the Respondents denied Carolyn Maddox her right to equal treatment in employment without discrimination because of a perceived handicap and

because of sex, in violation of sections 4(1) and 8 of the *Human Rights Code, 1981*, S.O. 1981, c. 53, which provide:

> "s. 4(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap."
>
> "s. 8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part."

The phrase "because of handicap" is defined in para. 9(1)(b) of the *Code*:

> "'because of handicap' means for the reason that the person has or has had, or is believed to have or have had,
> (i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device,
> (ii) a condition of mental retardation or impairment,
> (iii) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
> (iv) a mental disorder, or
> (v) an injury or disability for which benefits were claimed or received under the *Workers' Compensation Act*;".

1. Discrimination

To establish discrimination it is not necessary to prove intent to discriminate, rather it is the effect on the complainant that is determinative: "if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory": *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Limited*, [1985] 2 S.C.R. 536, at 551. In this case, Mrs. Maddox's continued long-term employment prospects were made conditional on losing weight. In other

words, a restrictive condition was imposed on her because of her obesity.

The main issue to be determined is whether this adverse treatment constitutes discrimination on the basis of perceived handicap or sex. The *Human Rights Code* does not prohibit all adverse treatment, but only that on grounds prohibited in the *Code*.

2. Discrimination because of handicap

(a) Approach to the definition of "handicap"

Whether obesity may constitute a handicap protected by the *Code* has been considered in only one other case in this jurisdiction. In *Horton v. Niagara (Regional Municipality)* (1988), 9 C.H.R.R. D/4611, W. Gunther Plaut, sitting as a board of inquiry, held that obesity is not a disability within the definition of handicap unless there is evidence that it was caused by bodily injury, birth defect or illness. He rejected the Human Rights Commission's "novel interpretation" that the *Code* is violated by any discrimination on the basis of perceived physical disability, whether or not the imagined handicap, if real, would have been caused by illness (at p. D/4612).

Ms. Joachim, counsel for the Commission, submitted that the board in *Horton* took the wrong approach. In effect, her argument is that obese people are discriminated against in our society and that the *Code* should be construed purposively to protect them, even if we have to, in her words, "twist and turn" to fit obesity within the definition of handicap. She submitted that it would be inconsistent with the purposes of the *Code* to protect only those persons whose obesity results from illness. I agree that such a distinction does not address the problem of prejudice against obese persons, but my mandate as a board of inquiry is "to determine whether a right of the complainant under this Act has been infringed": *Human Rights*

Code, s. 38(1)(a).

The *Code* guarantees equal treatment in employment without discrimination on the basis of certain stated attributes. Unlike the equality guarantee in subs. 15(1) of the *Charter of Rights and Freedoms*, there is no scope under s. 4 of the *Code* for a board to identify additional prohibited grounds of discrimination based on other personal characteristics. The legislature has retained that responsibility. No issue was raised as to whether s.4 thus violates subs. 15(1) of the *Charter of Rights and Freedoms*.

By contrast with s. 4 of the *Code*, part of the definition of "handicap", in clause 9(1)(b)(i) of the *Code*, does provide scope for the recognition of physical disabilities, infirmities, malformations or disfigurements in addition to those expressly mentioned. The Commission seeks a liberal construction of that clause to include obesity as a protected disability.

It is well-established that human rights legislation should be liberally and purposively construed. In determining that the Ontario *Human Rights Code* protects against unintentional discrimination on a prohibited ground, the Supreme Court of Canada held in *O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, per McIntyre J. at 546-47, that:

> "It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code *than the narrowest interpretation of the words employed.* The accepted rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment...and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional, but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect."

Further, in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, *supra*, Dickson, C.J.C. in determining that a human rights tribunal had jurisdiction to order an employment equity program, wrote, for the Court, that:

> "Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact....statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objectives are attained."

See, also, *Bhinder v. C.N.R.*, [1985] 2 S.C.R. 561, and *Robichaud v. Canada (Treasury Board)*, *supra*.

In light of these statements, human rights legislation is often described as being "quasi-constitutional." Nonetheless, it is ordinary legislation, embodying current legislative policy and susceptible of ordinary legislative amendment. Giving it a purposive interpretation is one thing. Treating it as a "living tree" is another. This distinction is made by the Federal Court of Appeal in *A.-G. Canada v. Mossop* (1990), 32 C.C.E.L. 276 (Fed.C.A.), per Marceau J.A., at 289-90:

> "As I understand the Supreme Court judgments, the main reason why the *Charter* had to be interpreted in a very special way, and particularly without the same deference to the historical intentions of the drafters and legislators is that the difficulties of amending the Constitution could cause its provisions to fall behind changes in society's conception of basic societal values and thereby render them inadequate and unable to fulfill its very role [citations omitted]...This is obviously not the problem with human rights acts which can be reviewed and amended like any other legislation.
>
> "There is no doubt that the courts, in giving effect to the provisions of human rights legislation, should act as liberally and as "bravely" as possible, bearing in mind that there are often at stake the interests of "unpopular" groups which must be defended from majoritarian opinions. But I believe that if the courts were to adopt, in interpreting human rights acts, a "living-tree" approach towards discerning new grounds of discrimination for proscription, or redefining past meanings given to existing grounds, they would step outside the scope of their constitutional responsibilities and usurp the function of Parliament."

The Federal Court of Appeal overturned a decision of the Canadian Human Rights Tribunal

which had held that the new guarantee of equal treatment on the basis of "family status" in the *Canadian Human Rights Act* applied to homosexual couples, notwithstanding that the Government had taken a deliberate decision not to include "sexual orientation" as a prohibited ground of discrimination in the *Act*. The Supreme Court of Canada has granted leave to appeal, and thus the issue is not settled, but the decision of the Federal Court of Appeal provides a useful distinction between the role of the court in constitutional interpretation and its role in interpreting legislation which can be readily amended.

It may also be noted that, because the *Human Rights Code* is aimed at the relations between private parties, it is important that it set forth clearly the grounds upon which discrimination is prohibited. One of the functions of the Commission, pursuant to s. 28(d) of the *Code*, is to develop and conduct programs of public information and education. The *Code* is widely distributed to give notice to people of their rights and obligations, and it is thus desirable that the legislation itself delineate those rights.

I conclude that I should take a liberal and purposive approach to the interpretation and application of provisions of the *Human Rights Code*,which aims, as its preamble states, to create:

> "a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province."

Nonetheless, in light of the fact that s. 4 of the *Code* confers no discretion to recognize additional or analogous grounds of prohibited discrimination, a board should, in my view, be cautious in extending the more open-ended definition of "handicap" beyond its plain meaning and the purposes it is intended to serve.

(b) The purpose of the prohibition against discrimination on the basis of handicap

"Handicap" as a prohibited ground of discrimination was added to the *Code* in 1981. In the first case dealing with handicap, Professor Cumming reviewed the development of human rights legislation in general and the protection of persons with handicaps in particular: see *Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170, at D/2170-2184, appeal to Div. Ct. dismissed; leave to appeal to C.A. denied. He concluded, at p.D/2180, that

> " The objectives of the *Code's* handicap provisions as they relate to employment are several.
>
> First, there is an objective of securing for the handicapped person equality of opportunity with respect to employment. Everyone deserves the same opportunity and chance to make the most of life, regardless of physical or mental handicap.
>
> A corollary is to require an employer to make a decision respecting employment of a handicapped person based upon a fair and accurate assessment of her true ability, and not based upon a stereotype or misconception about her handicap. *Having a handicap means not being able to do one or more important things that most people can do.* The law cannot make a person's handicap disappear, of course, but it does insist that every person receive a fair chance to show what she is able to do, taking into account her ability. The law now protects every person from being pre-judged because of handicap by an employer. Equal opportunity for someone with a handicap means equal opportunity to do the things she can do effectively and safely. The law does not impose any undue hardship upon the employer, or require that a person who presents a danger to the safety of the employee or others, or the employer's property, be employed." [emphasis added]

Further, in *Chamberlin v. 599273 Ontario Limited et al* (Ont. Bd. Inq., June 1989, unreported, a case concerned with mental disability, Ian C. Springate stated (at p. 22) that:

> "What the *Code* does do is ensure that persons with a handicap are not discriminated against with respect to jobs they are capable of performing. All too frequently handicapped persons are discriminated against, either out of irrational prejudice or ignorance, with respect to jobs they can perform."

In *Ouimette v. Lily Cups Ltd.* (Ont. Bd. Inq., March 17, 1990, unreported), taken by the Commission as a "test case", Dr. Baum rejected an argument on behalf of the Commission that

an employee, who was absent from work on one occasion because she had an allergic reaction resulting from her own carelessness and on another because she had the flu, was handicapped within the meaning of the *Code*. He agreed with Professor Cumming that the definition of physical handicap, in light of the examples of protected handicaps which are listed in clause 9(1)(b)(i) of the *Code*, requires "substantial ongoing limits on one's activities," or "an ongoing material source of impairment." Dr. Baum dismissed the complaint as materially deficient in law and, because he considered the complaint to be trivial and frivolous, awarded costs against the Commission.

I agree with this conclusion that "physical disability" within the definition of handicap does not encompass every physical attribute or condition on the basis of which an individual is unfairly treated. The physical disabilities which the *Human Rights Code* protects against are in the nature of ongoing physical limitations which an individual cannot change and which are not relevant to, in this instance, employment potential. As Professor Tarnopolsky, then sitting as a board of inquiry, noted in *Morgan v. Toronto General Hospital* (Ont. Bd. Inq., 1977, cited in *Cameron v. Nel-Gor Castle Nursing Home*, *supra*, at D/2198):

> "It is most important to one's personality, character, bearing, and even self-confidence to know that a denial of employment is due to a factor that one can overcome, or change, like a work record, rather than due to a factor that one cannot change, and which is not relevant to employment potential, like one's race, ancestry, or place of origin."

In *Jefferson v. Baldwin and B.C. Ferries Services* (B.C. Bd. Inq., Sept. 1976, unreported), the board noted that:

> - "physical disability has a characteristic one finds in a number of other protected categories such as race, colour, age and sex, namely that the person in the category can do nothing of his own volition to remove himself or herself from the category."

In *DeJong v. Horlacher Holdings Ltd.* (1989), 10 C.H.R.R. D/6283 (B.C. Human Rights Council, Barr), a woman with a virtually untreatable skin condition was thus found to have a physical disability within the meaning of the B.C. legislation. In other cases, shortness has been considered a physical disability: see *Poulter v. JACI Enterprises Inc.* (1989), 10 C.H.R.R. D/6141 (B.C. Human Rts. Council, Hughes); and *Ede v. Canada (Canadian Armed Forces)* (1990), 11 C.H.R.R. D/439 (Can. Hum. Rts. Trib.), as has the human immunodeficiency virus (HIV) (*Fontaine v. Canadian Pacific Ltd.* (1990), 11 C.H.R.R. D/288, Can. Hum. Rts. Trib.), high blood pressure (*Horton v. Niagara (Regional Municipality), supra*), allergies (*Morgoch v. Ottawa (City) (No.2)* (1989), 11 C.H.R.R. D/80, Ont. Bd. Inq.) and multiple sclerosis (*Engell v. Mount Sinai Hospital* (1990), 11 C.H.R.R. D/68, Ont. Bd. Inq.).

Obesity is unlike these other conditions. The evidence filed in *Hamlyn v. Cominco Ltd.* (1989), 11 C.H.R.R. D/333 (B.C. Human Rts. Council), which is supported by the evidence of Dr. Jenkins, referred to below, is that some of the factors which contribute to obesity, such as genetic predisposition, metabolic rates, hormone production, appetite set points and psychological factors, are largely beyond the individual's control. On the other hand, overweight individuals often lose weight through a reasonable program of diet and exercise. In some cases, obese persons have or are perceived to have physical limitations, but in others there is no such perceived or actual physical disability. Thus in *Hamlyn v. Cominco Ltd.*, *supra*, where it was established that it was unreasonable to expect that the complainant, who was grossly obese could lose the excess weight and where the employer assumed, without inquiry, that the excess weight would physically prevent the complainant from doing the job he sought, it was found that the complainant had been discriminated against on the basis of physical

disability. Where an employer perceives that an employee is physically limited by obesity and treats the employee adversely on that basis, the employer cannot avoid responsibility by establishing that, in actual fact, the employee is not physically limited: see *Gimello v. Agency Rent-A-Car Systems Inc. et al, a decision of the Director, Division on Civil Rights, Department of Law & Public Safety, State of New Jersey, April 1989, unreported, at pp. 24-25.*

In *State Div. of Human Rights v. Xerox Corp.*, 480 N.E. (2d) 695 (N.Y.C.A., 1985), the Court of Appeals of New York held that an employee is discriminated against on the basis of physical disability when denied employment because her obesity poses a "significant risk to short and long term disability and life insurance programs administered by" the employer. In coming to this conclusion, the Court distinguished between:

> "typical disability or handicap statutes narrowly defining the terms in the ordinary sense to include only physical or mental conditions which limit the ability to perform certain activities"

and the broader New York provision, there in issue, which defined "disability" to mean, at p. 696:

> "a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function *or is demonstrable by medically accepted clinical or laboratory diagnostic techniques...*" [emphasis added]

The New York Court of Appeals described the effect of this broader provision as covering "a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future" (at 698). The court concluded that obesity is a "disability" within this broader definition. To the same effect, see *Gimello v. Agency Rent-A-Car Systems, Inc. et al*, supra.

Clause 9(1)(b)(i) of the *Code* defines handicap as requiring physical disability caused by illness, and does not extend to conditions demonstrable by medically accepted clinical diagnostic techniques. In the instant case there was no doubt that Mrs. Maddox was able to perform effectively all aspects of her job, and the full range of her capabilities was perceived by her employer. [Transcript, p. 397] Although Mr. Goldford expressed concern about her future health, there was no evidence that this view was related to any impact her health or physical ability would have on her job performance.

As discussed below, the expert evidence in this proceeding establishes that people are discriminated against on the basis of their weight, but the fact of discrimination is not sufficient, in my view, to constitute a physical disability within clause 9(1)(b)(i) of the *Code*. In an article by N. Allon, entitled "The Stigma of Overweight in Everyday Life"[1], which was referred to by the Commission's witness, Dr. Ciliska, the author states that:

> "The fat person's major handicap may not be his or her obesity but the view that society takes of it...Overweight seems to be an example of how social groups are capable of creating new disabilities by the imputation of social deviance."

In my view the definition of "handicap" provides only limited protection to those who are discriminated against on the basis of appearance alone. The definition covers, in addition to physical disability, "infirmity, malformation or disfigurement." It has not been suggested that the obese can be considered "malformed" or "disfigured." Neither, in my view can the term "physical disability" be extended to include the appearance of obesity.

I conclude that obesity does not in itself amount to a physical disability within clause 9(1)(b)(i) of the *Code* unless it is an ongoing condition, effectively beyond the individual's

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[1] G. Bray (ed.), *Obesity in Perspective*, Washington: Government Printing Office (1975), 83-102, at p.99.

control, which limits or is perceived to limit his or her physical capabilities. On the facts of this case, there is evidence that Mrs. Maddox's obesity was an ongoing condition, but it was not established that the condition limited or was perceived by the respondents as limiting her physical capabilities.

(c) The requirement that the disability be caused by illness

I further conclude that, even if obesity constitutes a physical disability, it is not a handicap unless it was caused by illness. The *Ontario Human Rights Code* is stricter in its definition of handicap than are its counterparts in some other jurisdictions in that it requires that a disability be "caused by bodily injury, birth defect or illness." By contrast, the *Canadian Human Rights Act*, S.C. 1985, c. H-6, as amended, specifies "disability" as a prohibited ground of discrimination and now defines "disability", in s. 25, to mean "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug." Similarly, the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22, s. 8(1), prohibits discrimination with respect to employment "because of the...physical...disability of that person." I note, as well, the broad definition in the New York statute referred to above which defines disability to include any physical condition which is demonstrable by accepted medical diagnostic techniques.

Ms. Joachim submitted that obesity is recognized as an illness, that the disability and the illness are the same thing, and that the board should not require that the disability be caused by illness. By analogy, she argued that a person who suffers from AIDS comes within the definition of handicap even if the victim has as yet no symptoms of the disease: see *Fontaine v. Canadian Pacific Ltd.*, *supra*. Further, high blood pressure has been considered to

be a physical disability without establishing its cause: see *Horton v. Niagara (Regional Municipality), supra.*

Ms. Joachim relied upon the evidence of Dr. David J.A. Jenkins, B.A., M.D., Ph.D., D.Sc. (Oxford), Professor in the Department of Nutritional Sciences, and in the Faculty of Medicine, University of Toronto; Associate Physician, Division of Gastroenterology, Department of Medicine, Toronto General Hospital; Active Staff Physician, Division of Endocrinology and Metabolism, St. Michael's Hospital, Toronto; and Director, Clinical Nutrition and Risk Factor Modification Center, St. Michael's Hospital, Toronto. Dr. Jenkins specializes in the nutritional treatment of high blood lipids (high cholesterol), cardiovascular risk factors, diabetes and renal disease, all of which are conditions associated with obesity. Seventy to eighty percent of the patients who attend his clinics are obese.

Dr. Jenkins helpful report is attached as Appendix A. He testified that in North America, 20% of the population is obese. Most cases of obesity are caused by a combination of genetic and environmental causes. Only rarely is obesity caused by endocrinological problems. For many people who have gained extra weight, obesity is a treatable condition, but others who have endocrinological imbalances or what is referred to as "the prudent gene" which results in low metabolic rate, have great difficulty losing weight.

Because of the probability that it will enhance other medical risk factors, obesity is now classified as a disease and has been since 1986. Regardless what has caused the obesity, the condition itself is thus considered a disease. The medically accepted definition of disease is a condition which "limits one's life span or one's normal enjoyment of life." Dr. Jenkins indicated that obesity can have either or both types of impact.

Dr. Jenkins referred to two current definitions of obesity relied on by the medical profession and recognized by major international institutes. The first is "any weight which is above 120% of ideal body weight for height according to the New York Metropolitan Life tables," which were revised in 1983 to increase ideal body weights. The second definition of obesity is the body mass index, in which a person is considered obese if his or her weight in kilograms, over height in meters squared, exceeds 27 kg per square metre. Recent research, however, indicates that fat distribution may be a significant factor and thus, in Dr. Jenkins' words, "we may be being more selective in what we term obese in the future."

Ms. Joachim also presented as an expert witness Dr. Donna K. Ciliska, an Associate Professor in the School of Nursing at McMaster University who holds a cross-appointment in the Teaching Health Unit. The research for her Ph.D., which was awarded in 1989, involved a study of 142 obese women. She continues to work with a support group for the women in her study and also works with adolescents and school children on matters related to body image, body weight and body dissatisfaction. She is a member of the board of Hersize, a weight prejudice action group, for whom she acts as a resource person and adviser. She is the author of a book entitled *Psycho-Educational Interventions for the Chronically Obese: A Non-dieting Approach*, which is based on her doctoral research. Her area of expertise is in the development of programs to help obese women to accept their body shape and give up dieting.

In the course of her testimony on other matters, Dr. Ciliska stated that "there is tremendous controversy in the literature about whether obesity in fact is a disease, whether there are health risks associated with being obese." She proposed the following definition of obesity:

> "obesity is a heterogeneous and complex condition characterized by excess adipose tissue -- sometimes caused by an illness, a hormonal biochemical

problem, and sometimes genetic."

Dr. Ciliska testified that prior to her doctoral research she was "the type of health professional who believes that all overweight perople should and could lose weight." [Transcript, pp.308-9] Now her view is that:

> "some people who are overweight are probably genetically overweight and if they are not having health problems...are better off, actually, by eating normally and exercising lightly as opposed to continuing to try to diet."

Dr. Ralph, Mrs. Maddox's general physician, testified that in his view Mrs. Maddox's weight, at her age, was not the cause of any physiological problem. [Transcript, p.231]

Ms. Joachim submitted that neither Dr. Ciliska nor Dr. Ralph were qualified as expert witnesses on the question whether obesity is a disease, and that I should rely on the evidence of Dr. Jenkins on this issue. I accept Dr. Jenkins' evidence that obesity is now recognized by medical experts as a disease. It is not, however, a disease which causes a disability. Rather, it is a condition which enhances other risk factors with such probability that it is now designated as a disease. This does not establish, in my view, that obesity is a physical disability caused by illness, as required if obesity is to be recognized as a handicap within the provisions of the *Human Rights Code*. Dr. Jenkins' evidence was that obesity is rarely caused by illness. It is generally the result of genetic and environmental factors.

In any event, protecting only those who come within the changing medical definitions of obese would not address the full scope of the problem of discrimination on the basis of weight. Dr. Ciliska testified that the literature on attitudes towards obese people indicates that individuals vary in their perception whether someone is obese or overweight and in the degree of excess weight which affects their attitudes. [Transcript, p.318-19, 328 ff]

In view of my conclusion that obesity is not a disability caused by a disease, I need not decide what significance to attach to the fact that obesity was not officially recognized as a disease in 1985 when the events at issue occurred, and that even in 1990 the nature of obesity is not treated as settled by researchers in related fields such as Dr. Ciliska or by general physicians such as Dr. Ralph. As the Supreme Court of Canada noted in *Canadian National Railway Co. v. Canada (Human Rights Commission), supra*, and in *Robichaud v. Canada (Treasury Board), supra*, the purpose of human rights legislation is to remedy discrimination rather than to find fault. Nonetheless, it would in my view be unreasonable to find retroactively, in light of subsequent medical developments, that a common condition, widely considered to be within an individual's control, is actually a handicap which gives rise to obligations under the *Human Rights Code*.

I thus conclude that, since it is not established that obesity is a physical disability caused by illness, it is not recognized as a handicap within s. 4 and clause 9(1)(b)(i) of the *Human Rights Code*. This does not preclude an individual from establishing that, in his or her particular case, obesity is a disability caused by illness: *Horton v. Niagara (Regional Municipality), supra*. Accordingly, an employer assumes a risk if he or she discriminates against an individual on the basis of obesity.

3. Discrimination because of Sex

In November 1989, the Commission amended the complaint to add a claim that Mr. Goldford's conduct constituted discrimination because of sex. Ms. Joachim submitted that requiring a woman employee to lose weight in order to enhance her presentability to customers amounts to discrimination in employment because of sex.

Ms. Joachim made no reference in argument to the evidence of Dr. Ciliska on the question whether women are more discriminated against on the grounds of obesity than are men, but Mr. Adams relied upon it. In the course of her research, Dr. Ciliska has reviewed the literature on reactions to obesity. She summarized the results of this research in a helpful report which is attached as Appendix B. The literature establishes, in Dr. Ciliska's words, that "beginning at a very early age children and adults in a western society attribute negative personality characteristics to obese children and adults." [Transcript, p. 313] She provided a selection of studies which reflect the state of the literature generally. Some of the studies deal with attractiveness generally, rather than obesity specifically, concluding that negative personality traits are attributed to unattractive people. In the studies that focus on weight, there is no consistent definition of "overweight" or "obese". The literature reflects the fact that the definition of "obese" or "overweight" differs from person to person. Individuals vary in their perception whether someone is obese or overweight and in the degree of excess weight which affects their attitudes. Most of the studies were conducted some years ago, and their methodology is largely correlational, which does not yield the most conclusive results. Nonetheless, Dr. Ciliska concluded, on the basis of her recent clinical experience, that obese women continue to experience negative reactions.

On the question whether "discrimination against obese females may be more severe than prejudice directed against obese men" Dr. Ciliska indicated that the literature is mixed. The most recent study found no difference in prejudice as between men and women. Dr. Celiska testified that she believes there is considerable discrimination against obese women, but stated that she could not comment on whether it is more severe than that experienced by

men, since she has no clinical experience working with overweight or obese men.

Ms. Joachim invited me to infer from the circumstances that Mr. Goldford's requirement that Mrs. Maddox lose weight was related to her being a woman as reflected in his comment that she would be prettier if she lost weight. Ms. Joachim relied on the case of *Whitehead v. Servodyne Canada Ltd.* (1987), 8 C.H.R.R. D/3874 (Ont. Bd. Inq., Soberman), in which the board of inquiry found that the complainant had been dismissed from her job as a plant supervisor in part because she was a woman. As in the instant case, comments had been made about Ms. Whitehead's physical appearance and her weight. However, in that case there was also evidence of disparaging comments related specifically to the fact that Ms. Whitehead was a woman, and the evidence established that Ms. Whitehead was fired as plant manager, despite her competence and experience, so that she could be replaced by a man. I do not read the case as establishing that the remarks about Ms. Whitehead's weight or appearance were sufficient to establish discrimination on the basis of sex.

In the instant case the evidence of the Commission establishes that men and women are both discriminated against on the basis of obesity. The case law cited by counsel supports the conclusion that both men and women are treated unfairly on the basis of their weight. In the face of this evidence, I cannot find that discrimination on the basis of attractiveness in general and weight in particular is directed at women, as distinct from men. Further, on the facts of the case, I do not infer that the requirement that Mrs. Maddox lose weight constitutes discrimination on the basis of sex. My conclusion is supported by the fact that Vogue Shoes employed other women of comparable size and that there is no evidence that Mr. Goldford considered their weight to be a problem. The Commission has not met its onus

of establishing that Mr. Goldford's requirement that Mrs. Maddox lose weight was, at least in part, because she was a woman: *R. v. Bushnell Communications Ltd.* (1973), 45 D.L.R. (3d) 218; aff'd (1974), 47 D.L.R. (3d) 668 (C.A.); *Horton v. Niagara (Regiona Municipality), supra*; *Engell v. Mount Sinai Hospital, supra*, at D/72.

4. Conclusion

I thus conclude that the complaint must be dismissed, that it has not been established that Mrs. Maddox was discriminated against because of handicap or sex. The evidence does not support the conclusion that obesity in general or Mrs. Maddox's obesity in particular is a disability caused by illness. Nor has it been established that women are more discriminated against than men on the basis of obesity, or that the discrimination in this case amounted to discrimination because of Mrs. Maddox's sex. I come to these conclusions with reluctance since, in my view, Mr. Goldford acted unfairly and unreasonably in imposing a requirement -- any requirement -- that Mrs. Maddox lose weight.

The studies referred to by Dr. Ciliska indicate that there is widespread discrimination in North America against unattractive people, women and men, girls and boys, but the *Ontario Human Rights Code* does not prohibit discrimination on the basis of appearance. To cast the issue as one of sex discrimination does not address the full scope of the problem. Neither is it realistic to determine that a person who is overweight is, for that reason alone, disabled, infirm, malformed or disfigured as a result of illness within the definition of "handicap." In my view, the problem of discrimination on the basis of appearance is one which must await-legislative action.

IV. Remedy

In light of my finding that the discrimination against Mrs. Maddox does not infringe the *Human Rights Code*, the issue of remedy does not arise in these proceedings, but it is nonetheless appropriate in all the circumstances that I provide my assessment of the evidence with respect to remedy.

The Commission seeks special and general damages, payable to the estate of Carolyn Maddox. Initially, the Commission also sought an order to ensure future compliance with the *Code*, but Ms. Joachim withdrew that request at the conclusion of her submissions, on the basis that she was content that the ruling would be understood and followed by the respondents.

1. Special Damages

The Commission seeks special damages in an amount equivalent to the wages and commissions which Mrs. Maddox would have earned if she had remained working at Vogue Shoes until she commenced employment with the Boot Shop in September 1986. Counsel for the Commission and for the respondents jointly submit that no amount is to be deducted with respect to the unemployment benefits received by Mrs. Maddox. Rather, those benefits, for the period for which damages are awarded, would be deducted from the award and remitted as required by law: see *Bloomer v. Ratych* (S.C.C., May 3, 1990, as yet unreported).

The damages awarded should "restore a complainant as far as is reasonably possible to the position that the complainant would have been in had the discriminatory act not occurred": *Re Piazza and Airport Taxicab (Malton) Association* (1989), 69 O.R. (2d) 281 (C.A.), at 284. The purpose of the damage award is twofold: restitution for the complainant

and enforcement of the broader social policy objectives of the Code: *Cameron v. Nel-Gor Castle Nursing Home, supra,* at D/2196. Accordingly, in determining the measure of damages for loss of employment, the appropriate period of time is not the period of notice under contract and employment standards law, but the time reasonably required to find other employment: *Cameron v. Nel-Gor Castle Nursing Home, supra*, at D/2197; *Re Piazza, supra,* at 284.

A complainant is under a duty to take reasonable steps to find employment to mitigate her loss: *Cameron v. Nel-Gor Castle Nursing Home, supra, at para. 18534.* Where a respondent alleges that the complainant could have done more, the onus of establishing what reasonably could have been done is borne by the respondent: *Red Deer College v. Michaels and Finn*, [1976] 2 S.C.R. 324.

The Commission's evidence of mitigation in this case consists of the transcript of the examination for discovery of Carolyn Maddox in the wrongful dismissal action [Exhibit 7], the letter of introduction and resume prepared by her [Exhibit 6, Tab 3], her record of job inquiries from September 1985 to April 1986, which was produced at the discovery [Exhibit 6, Tab 4], and the evidence of Donald Maddox that his wife continued to seek work after April 1986. Counsel for the Commission also relies on the fact that Mrs. Maddox would not have continued to receive unemployment benefits if she had not been searching for work, but no evidence was provided in support of this requirement or its application to Carolyn Maddox.

The respondents rely on answers given by Mrs. Maddox at her examination for discovery, the fact that there were at least forty shoe stores in the Niagara Region [Exhibit 28], the fact that experienced and capable shoe salespersons are in demand, and on photocopies of selected pages of employment advertisements appearing in the *St. Catharines Standard* from

August 1985 to September 1986, which were admitted in evidence on consent [Exhibit 29]. The death of Mrs. Maddox affects the evidence adversely for the Commission in that there is no specific evidence of her job search after April 1986 and no explanation as to why she did not make the job inquiries which the respondents submit would have been reasonable in mitigation.

The evidence shows that after ceasing to work at Vogue Shoes, Mrs. Maddox prepared a resume and a covering letter to send to prospective employers, in which she stated that "for personal reasons which I will be happy to explain at an interview, I am not using my last employer as a reference." Mrs. Maddox did not request, and Mr. Goldford did not provide, a letter of reference.

The record of job inquiries from August 1985 to April 1986, shows that Mrs. Maddox made inquiries in person at three shoe stores and one shoe department, one ladies wear store and one hardware store. She also sent her resume in response to advertisements in the *St. Catharines Standard* for (1) four different positions in dental offices for receptionists, some including secretarial duties, (2) sales positions in building supplies, lumber, legal forms, advertising, and wholesale electrical supplies, (3) a job as a cash counter, (4) a position as manager of a wholesale hardware firm, and (5) a position in sales and marketing management with Canada Life. She received no response to any of these applications, and there is no evidence that she made any subsequent inquiries or pursued any of the applications. Her notes indicate that she attended at Canada Manpower on three occasions, but found no suitable job postings. There is no evidence of specific job inquiries after April 1986, when Mrs. Maddox was examined for discovery, but her husband Donald Maddox testified that she continued to seek employment.

Mrs. Maddox applied for Unemployment Insurance benefits, which commenced in September 1985. I was advised by counsel that she was entitled to 50 weeks of benefits after a two week waiting period. In September 1986, a year after leaving Vogue Shoes, Mrs. Maddox commenced full-time employment at the Boot Shop.

Mr. Goldford testified that capable and experienced footwear salespeople are in demand. Mrs. Maddox canvassed only a few of the many shoe stores in the area. It does not appear that she responded to advertisements for shoe sales positions which appeared in the St. *Catharines Standard*, from which she obtained information about employment opportunities. In particular, in September 1985, The Right House and The Boot Shop both advertised for shoe salespersons. In February, a firm advertised for a retail manager for a factory outlet, stating that footwear experience was an asset. The Boot Shop advertised for a salesperson again in February and July, and a "Local High Grade Shoe Salon" advertised for a manager in July 1986. The evidence shows that Mrs. Maddox did not apply for any of these positions that were advertised before April 1986. There is no specific evidence of her employment applications after April 1986.

The copies of newspaper pages provided by respondents' counsel were highlighted to indicate advertisements of sales positions in a variety of other fields, including wholesale automotive distribution, cosmetics and colour coding, jewellery, memorial gardens, industrial and commercial heating, direct mail advertising, fabrics, furniture and appliances, gifts and china, men's clothing, paint and wallpaper, ladies wear, electrical supply, industrial sales, railway track, printing, flooring, computerized business systems, industrial supplies, transport, cellular telephones, kitchen cabinets, frozen food products, landscaping, hardware, cameras,

pets, patio furniture and outdoor products, business forms, and educational and personal development services. Also highlighted were advertisements for persons to sell weight loss and fitness programs. In all the circumstances, it is hardly reasonable to expect Mrs. Maddox to apply for a job promoting weight loss services. In addition, there was no evidence to establish that Mrs. Maddox had the technical expertise or background required by some of the highlighted advertisements, although I note that this could be said as well about some of the jobs for which she did apply. In any event, there were a number of positions in sales which Mrs. Maddox could reasonably have pursued.

I conclude on all the evidence that Mrs. Maddox's job search was perfunctory. She did not pursue opportunities which she might reasonably have been expected to pursue and, where she did submit applications, there is no evidence that she did anything beyond submitting a resume and form "letter of introduction" which indicated that she did not wish to provide a reference from her previous employer.

Mr. Adams submitted that Mrs. Maddox could reasonably have been expected to continue in her employment with Vogue Shoes until December 1985, as Mr. Goldford offered, which would have provided her with sufficient time to find a new job. She had continued to work after previous discussions about losing weight, and there had been no problems during her final week of work. He relied on the decision of the Ontario Court of Appeal in *Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701 (C.A.), a wrongful dismissal action, in which the Court held that an employee who alleges that he has been constructively dismissed when he is transferred to a job with less responsibility, may be obliged to accept the new position as a reasonable means of mitigating damages:

> "Where the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and *where the personal relationships involved are not acrimonious* (as in this case) it is reasonable to expect the employee to accept the position offered in mitigation of damages during a reasonable notice period, or until he finds acceptable employment elsewhere." [emphasis added]

The same principle applies in claims of discrimination on the basis of handicap under the *Code*. Thus in *Cameron v. Nel-Gor Castle Nursing Home, supra*, Professor Cumming held that a complainant who had been improperly denied a job as a nursing aid because she had three short fingers would have been obliged to mitigate her damages by accepting a job in the nursing home's crafts department, without giving up her rights under the *Code*. This conclusion was based on the fact that there was no "on-going personal animosity, which would have made working in an alternative position difficult." The complainant in that case would not have been justified in turning down the other position solely because she felt offended and hurt about being denied the position she sought.

Mrs. Maddox was not willing to remain at Vogue Shoes. She had already decided, for a variety of reasons, that the next time she had a problem with her boss, she would leave. In my view, however, he gave her good reason to leave on August 3, 1985 when he required that she lose 35 pounds in a relatively short time, and he compounded the situation when he confirmed in his letter of August 15, 1985 that her long term employment prospects were conditional on losing weight. In those circumstances, she was not obliged to continue in employment where she would inevitably be in close contact with Mr. Goldford. The fact that she obliged him by working a final week in the absence of another employee, does not condone his actions or oblige her to accept continued employment.

Taking into account all the circumstances of this case, it is my view that Mrs.

Maddox was not obliged to accept continuing employment in mitigation of her damages. She was, however, obliged to undertake a reasonably diligent search for realistic employment, which it appears she did not do. If she had put a reasonable effort into finding a position, it is my view that she would have been successful at finding a comparable position within a maximum of twenty weeks. As in *Gohm v. Domtar Inc.*, (Ont. Bd. Inq., Pentney, May 1990) at p. 74, "my findings are based on my assessment of her efforts, rather than the actual likelihood of success of any particular application." Further, as in *Gohm v. Domtar Inc.*, at p. 76, I find that it was not "reasonably foreseeable that her efforts would be unsuccessful beyond this period." Accordingly, if I had found discrimination contrary to the *Code*, I would have calculated the special damages on the basis of salary and commissions she would likely have received for that twenty week period. Taking into account the fact that interest should be awarded only on that part of the special damages which is in excess of unemployment insurance payments received by Mrs. Maddox, and also taking into account the fact that the inconvenience resulting from the delay in this matter should be borne by both the parties, I would fix the amount to be awarded for interest at $2,000. I will remain seized of the matter, so that counsel may speak with me if they consider it advisable that the the order reflect the actual amount of special damages which would be calculated on this basis.

2. General Damages

The Commission also seeks general damages in the amount of $5,000 for injury to dignity and self respect and loss of the right to freedom from discrimination. The measure of general damages requires consideration of two factors: the effect of the discrimination upon the complainant and whether the discrimination was wilful or reckless, thus justifying a punitive

award: *Morgoch v. Ottawa (City) (No.2)*, *supra.*

Respondents' counsel submitted that this is not an appropriate case for an award of general damages since there was no evidence that Mr. Goldford acted with malice or ill-will and since there were other problems with Mrs. Maddox's employment performance.

Mrs. Maddox's reaction to the August 3rd discussion is somewhat ambivalent. On the one hand, she was upset. On the other hand, she had decided to leave the job in any event and strategically capitalized on the opportunity which had presented itself. She entered Mr. Goldford's office at night without his knowledge or consent to photocopy his notes. She treated the discussion as a dismissal, rather than take any steps to negotiate a resolution which would have served the purposes of the *Human Rights Code*. It does not appear from the contemporary medical records that her state of mind or physical health was affected adversely by the act of discrimination. Although she continued to suffer sleeplessness, depression and other symptoms, these conditions do not appear to have been exascerbated by the events in issue.

If, however, contrary to the conclusion I have reached, it were determined that the respondents' action infringed the *Human Rights Code*, I would have found that it constituted a direct affront to her dignity and self-respect and her right to be evaluated, for employment purposes, on the basis of her job performance, independent of her physical appearance. In all the circumstances of the case, including the fact that it would very likely not have been clear to Mr. Goldford, even after taking legal advice, that his conduct infringed the *Code*, I would not be prepared to add any punitive element to the general damages.

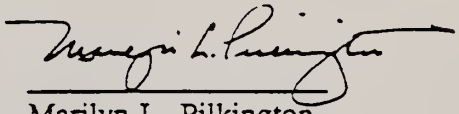
After weighing carefully the special circumstances of this case, I would assess the complainant's general damages, if required to do so, in the amount of $2,000, inclusive of

interest.

V. Order

Accordingly, I order that the complaint of the Human Rights Commission that the respondents discriminated against Carolyn Maddox because of handicap or because of sex by requiring that she lose weight if she wished to continue to work as a shoe salesperson be dismissed.

I remain seized of the complaint so that, if counsel deem it advisable to specify the amount of special damages that would have been awarded on the basis discussed herein or to add to the style of cause the name of the company carrying on business as Vogue Shoes, they may speak to me further.



April 8, 1991
Toronto, Ontario

Marilyn L. Pilkington
Board of Inquiry

Appendix A

Report on Obesity
to Human Rights Board of Inquiry
by: David J.A. Jenkins, B.A., M.D., Ph.D., D.Sc. (Oxon.)
May 1990

Definition of Obesity

Obesity has been defined as any weight which is above 120% of ideal body weight for height according to the New York Metropolitan Life tables which also take into account frame size (ie. small, medium and large frame size). More recently, obesity has also been defined as a body mass index (BMI) of greater than 27 kg/M^2 (ie. weight in kg divided by height^2 in meters). Possibly more important than the adipose tissue mass is its distribution. It is now recognised that central (abdominal) or male type obesity is the form of obesity most associated with the major complications of cardiovascular disease, diabetes and hypertension. A crude measure of central adiposity is the waist-hip ratio. Suggested values for men are below 1.0 and for women 0.8.

The Usual Symptoms of Obesity

The symptoms of obesity will depend on the severity and duration of the obesity and the presence of those disorders (diabetes, hypertension, cardiovascular disease, osteoarthritis, etc) which are made worse by obesity.

Potential symtoms therefore which may be associated with obesity include limited morbility, breathlessness, easy fatigue, chest pain, joint pain in weight bearing joints (kness, hips and spine), acid regurgitation ("heart-burn"), urinary incontinence, and itching and soreness between the skinfolds.

The Proportion of the Population Who Are Obese

Approximately 20% of the adult North American population are obese. The proportion varies from region to region. Thus in the Atlantic provinces, there are nearly double the number of people with a BMI of 26 or more than in British Columbia. Furthermore, the proportion of the population who are obese increases with age.

The Leading Causes of Obesity

There are both genetic and environmental causes:

Socioeconomic factors: eg. 17% of women earning less than $10,000 had BMIs of over 28.8 compared with only 5% of women earning over $38,000.

Genetic: Twin studies suggest that hereditary factors may be as or more important than environmental especially in the context of western society. This may also relate to the reduced metabolic rate seen in some obese individuals.

Childhood Obesity: 80% of obese children become obese adults. This may reflect both the genetic effects and the results of entrained feeding habits during infancy and childhood.

Pregnancy: In some women, weight gain with pregnancy may not be lost postpartum and may be additive with successive pregnancies.

Endocrine: Abnormalities of thyroid and adrenal function may result in weight gain but these are rare in proportion to the total number of obese people in the community.

Energy Balance: Ultimately excess weight is the result of calories taken in in excess of needs (eg. 1000 extra kcals per day will result in approximately 1kg weight gain over the course of a week).

Effect of Aging

In western society, the adipose tissue mass tends to increase from the 20's to reach a peak for the population at approximately 50y of age.

Health Risks Associated with Obesity

These will depend on the degree of obesity, the distribution of the fat (ie. especially if abdominal in distribution), the age of the individual and the manifestation of other diseases or a genetic predisposition.

Medical problems associated with obesity include:

1) Hyperlipidemia (especially raised triglyceride levels) and cardiovascular disease
2) Hypertension
3) Diabetes
4) Osteoarthritis of weight bearing joints
5) Obstructive sleep apnoea (especially males)
6) Gall-stones, fatty liver, gastroesophageal reflux
7) Deep vein thrombosis
8) Menstrual irregulaties, infertility and hirsutism especially in females
9) Stress (urinary) incontinence
10) Cancer of breast and endometrium

It is also true that some individuals appear to be unaffected by obesity. In addition, the relationship between obesity and disease risk is not as close over the age of 65y.

Obesity as A Disease

The 1986 National Institutes of Health Consensus Conference on Obesity, chaired by Dr Jules Hirsh, stated that obesity was a disease. The exact level of adiposity at which obesity becomes a disease is still debated as is the importance of the fat distribution. Furthermore, the age of onset and other disease tendencies must also be taken in account. Currently if a disease is defined as a state which limits the quality of life, and/or life expectancy then the waist-hip ratio appears to be a major diagnostic guide for major diseases. Many authorities including Dr George Bray and Dr Jules Hirsh would also suggest obesity as a disease at BMI values greater than 27. Certainly so called excessive or "morbid" obesity is more generally recognised as a disease.

4

Treatment of Obesity

Many overweight people lose weight successfully without consulting those with special interests or expertise in this area. Those who do enrol in treatment programs tend to be those who have failed to lose weight or maintain weight lost. They therefore represent a group who are difficult to treat and although they may lose weight initially, they are noted for a high rate of recidivism in which 90% or more may regain lost weight.

Appendix B

REPORT TO HUMAN RIGHTS BOARD OF INQUIRY

BY: *Donna Ciliska*

DATE: *May 10, 1990*

RE: *Stigmatization of the Obese*

There is tremendous cultural pressure on women to be thin--pressure which leads to 1) incredible amounts of time, energy and money spent on weight loss attempts, 2) increased risk for the development of eating disorders, and 3) strong prejudice against the obese (Allon, 1975).

Silhouettes of the obese are described as "lazy", "stupid", "ugly" and "cheats" by children as early as age six (Staffieri, 1967). Children and adults, and the obese themselves, rate line drawings of obese children as less likeable than drawings of handicapped, severely disfigured or normal weight children (Goodman, Dornbusch, Richardson & Hastorf, 1963; Maddox, Black, & Liederman, 1968; Richardson, Goodman, Hastorf, & Dornbusch, 1961).

A number of more recent studies have shown that judgments of peers and professionals about the mental health of subjects vary with judgments of attractiveness (Barocas & Vance, 1974; Gottheil & Joseph, 1968). In one such study, subjects rated persons on interview tapes as more disturbed and having poorer prognoses if an "unattractive" picture was attached than if there was an "attractive" one or physical anonymity (Cash, Kehr, Polyson, & Freeman, 1977). Interaction of health care providers with obese clients is also affected by the anti-fat basis. Mental health workers were asked to rate a history to which a photograph of a middle aged woman was attached (Young & Powell, 1985). The same case was presented in every instance, but the photo was altered to be best-weight, overweight and obese. Workers assigned more negative psychological symptoms to the obese than the other two models. Ratings of the obese were less harsh if the health care worker was older as opposed to younger, male rather female, overweight as opposed to average weight. These findings indicate decisions regarding severity of symptoms are affected by weight of the client, as well as age, sex and weight of the therapist.

It has been suggested that discrimination against obese females may be more severe than prejudice directed against obese men (Orbach, 1978; Wooley & Wooley, 1979; Wooley, Wooley & Dyrenforth, 1979). Discrimination against the obese is manifest in lower acceptance rates at high-ranking colleges (Canning & Mayer, 1966), in a reduced likelihood of being hired for jobs in the workforce (Larkin & Pines, 1979), and in a lower possibility of movement to higher social class through marriage (Elder, 1969). Canning & Mayer (1966) noted that 23.3% females and 18% of males graduating from high school were overweight. However,

in the college freshman class, only 11.2% of the females were overweight, as compared to 13% of the males. This represented a significant difference for females but not for males. In the same study, 51.9% of non-obese women, versus 31.6% of obese woman, went to college after high school graduation. There was no difference in rates for men (Canning & Mayer, 1966). However, another study of college students has found no difference in severity of discrimination against the obese of either sex (Harris, Harris & Bochner, 1982). With respect to income, a survey done for the magazine *Industry Week* has shown that male executives lose an estimated $1,000 per pound overweight per year ("Fat execs", 1974).

In summary, there has been a tremendous anti-fat mentality in our society which may lead to body dissatisfacton in women who try to live up to the cultural standard, and bias and discrimination against people who deviate from that ideal.

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